SUPREME COURT

No. 73-1343

APR 25 1974

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

HAROLD W. BROBECK, PETITIONER

v.

UNITED STATES OF AMERICA AND THOMAS M. PLASKO, SPECIAL AGENT, INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Washington, D. C. 20530.

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1. Following a hearing before the United States District Court for the Western District of Pennsylvania, that court entered an order on August 3, 1973, holding petitioner in contempt because of his refusal to obey a prior order of the district court directing him to comply with an Internal Revenue Service summons. Petitioner was committed until he

obeyed the order (R. 25).[1] The court of appeals affirmed (Pet. 11-12).

The summons (Pet. 12) was issued pursuant to Section 7602(2) of the Internal Revenue Code of 1954, 26 U.S.C. 7602(2) and required petitioner, as president of Beaver Valley Volkswagen, Inc., to produce specified corporate records for the years 1970 and 1971 (R. 8-9). Petitioner appeared in response to the summons but refused to produce the summoned records, claiming his privilege against self-incrimination (Supp. R. 12-13). A petition to enforce the summons was then filed.

At the hearing held by the district court on June 11, 1973, at which petitioner did not appear, the agent of the Internal Revenue Service who issued the summons testified concerning its issuance and petitioner's refusal to comply. He also testified that the official records of the Commonwealth of Pennsylvania indicated that the corporation, Beaver Valley Volkswagen, Inc., was incorporated on October 31, 1963, that it was still in existence, and that petitioner was its president. Following the hearing, the district court ordered petitioner to appear before the agent on or before June 25, 1973, and to produce the corporate books, records, and other papers relating to his tax liability (R. 13). Although petitioner appeared before the agent on June 18, 1973, he de-

[1] "R." and "Supp. R" references are to the appendix and supplemental appendix respectively filed by petitioner and respondents in the court of appeals.

clined to furnish the summoned records because of fear of incrimination (R. 29, 30-33; Supp. R. 28-29).

On July 30, 1973, a second hearing was held on an order to show cause why petitioner should not be held in contempt. The agent testified that petitioner had appeared before him but had refused to produce the records (Supp. R. 26, 28-29, 33-34). Despite several warnings from the district court that this was petitioner's opportunity to present anything he desired in his defense (Supp. R. 41, 46), petitioner did not testify or produce any evidence. Petitioner again stated that he declined to produce any documents on the ground that to do so might incriminate him. (Supp. R. 38-40.) On August 3, 1973, the district court filed an opinion and entered an order holding petitioner in contempt (R. 18-25).

2. Petitioner argues (Pet. 5) that the refusal of the district court to permit one Jerome Daly to act as his counsel during the contempt hearing violated his First Amendment rights. Daly informed the district court that he was a former member of the bar of the State of Minnesota and had been disbarred.[2] The court thereupon stated that Daly could sit at counsel table but would not be permitted to examine witnesses or perform the functions of a duly licensed attorney (R. 21, n. 3). While a litigant normally has the right to retain counsel of his choice, this Court has held that absent some showing of a grave defect in the disbarment proceedings, the disbarment

[2] See *In re Jerome Daly*, 291 Minn. 488, 189 N.W.2d 176.

of an attorney operates to terminate his right to practice before the federal courts as well. *Selling* v. *Radford*, 243 U.S. 46. See also *In re Barton*, 54 F. 2d 810 (N.D. Cal.).

Indeed, if Daly had been permitted to represent petitioner in the comtempt proceeding, it is possible that such representation may have denied petitioner his right to "the assistance of counsel" under the Sixth Amendment. Cf. *Harrison* v. *United States*, 387 F. 2d 203, 212, n. 41 (C.A.D.C.). Under these circumstances, the district court was amply justified in refusing to permit Daly to examine witnesses or to perform the function of representing petitioner.[3]

3. Finally, petitioner urges (Pet. 8) that the order directing him to comply with the Internal Revenue Service summons infringed his privilege against self-incrimination. The summons, however, sought only corporate records and the Fifth Amendment privilege against self-incrimination does not bar the production of such records. *Hale* v. *Henkel*, 201 U.S. 43; *Wilson* v. *United States*, 221 U.S. 361; *Grant* v. *United States*, 227 U.S. 74. See also *Campbell Painting Corp.* v. *Reid*, 392 U.S. 286, 288-289.

Petitioner's claim of privilege, moreover, relates to events which allegedly occurred at a subsequent hearing on or about October 8, 1973. That second hearing was held by the district court for the purpose

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[3] Petitioner's assertion (Pet. 5-6) that the district court's enforcement order went beyond the scope of the summons is similarly without substance. The summons only sought specified corporate records relating to two years (Pet. 12).

of determining whether petitioner in fact had custody of the records in question. He states that he testified at this hearing that he did not have the corporate records in his custody or control, and that he is improperly confined because he refused to incriminate himself by revealing their whereabouts in response to a demand by the district court. In fact, it was not until approximately August 13, 1973, more than a week after entry of the contempt order and after the commencement of his confinement, that petitioner first argued that he did not have custody or control of the summoned documents. His confinement, therefore, was not because of a refusal to testify concerning the whereabouts of the documents but because of his failure, without justification, to produce them.

The hearing to which petitioner refers actually took place on October 9, 1973. At the conclusion of that hearing, the district court determined that petitioner had not met his burden of establishing his inability to comply with the order to produce.[4] No appeal was taken from that determination. Any challenges to that determination cannot be raised for the first time in this Court. If petitioner can demonstrate the futility of continued application of the con-

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[4] We have lodged a copy of the transcript of this proceeding with the Clerk of this Court. The district court's memorandum and order of October 18, 1973, is set forth at Appendix A, *infra*, pp. 7-13.

tempt order, his remedy is an application to the district court to vacate that order.[5]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.

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[5] Petitioner also contends (Pet. 6-8) that the district court did not make findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure. But the required findings appear in a memorandum opinion (R. 18-24) the district court filed on August 3, 1973. There was therefore compliance in all respects with Rule 52(a), which provides that "[i]f an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. * * *"

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 73-389

UNITED STATES OF AMERICA, and THOMAS M. PLASKO, Special Agent Internal Revenue Service, PETITIONERS

v.

HAROLD W. BROBECK, as President of Beaver Valley Volkswagen, Inc. and BEAVER VALLEY VOLKSWAGEN, INC., RESPONDENTS

MEMORANDUM AND ORDER

MILLER, J.

Subsequent to the docketing of his appeal by the Third Circuit Court of Appeals, Harold W. Brobeck moved this Court for a further hearing to show his inability to comply with our Order of June 11, 1973, to produce specified books and records of Beaver Valley Volkswagen, Inc., for which his refusal, without adequate excuse or just cause, has resulted in his being held in contempt. In view of the posture of the proceedings, upon receipt of the motion, we forwarded it to the Clerk of the Third Circuit Court of Appeals. Thereafter, on September 27, 1973, the Appeals Court, after denying bail pending appeal and expediting the appeal, granted this Court leave to

conduct such further proceedings it deemed appropriate. Exercising our discretion, we granted Mr. Brobeck a further hearing to permit him to purge himself of contempt. Thus, the sole question is whether the respondent is presently able to comply with the production order previously made and whether he is disobeying that order.

The government's proof at the enforcement and contempt proceedings established a prima facie case of wilful failure to comply with the Order of this Court to produce the corporate records. Mr. Brobeck's Fifth Amendment claim did not excuse him from producing the records of Beaver Valley Volkswagen, Inc., for it is well settled that "books and records kept 'in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though the production of the papers might tend to incriminate [their keeper] personally.' *United States* v. *White*, 322 U.S. 694 699 (1944)." *McPhaul* v. *United States*, 364 U.S. 372, 380 (1960); *Rogers* v. *United States*, 340 U.S. 367, 372 (1951). At no time prior to his commitment did respondent even suggest to the government or this Court, notwithstanding two opportunities to do so, his inability to produce the records. On the contrary, respondent in face of the government's evidence adhered to his claim of constitutional privilege standing mute as to his inability to comply with our Order. Thus, we believe the government's proofs coupled with the respondent's failure to offer any evidence regarding his ability to

comply clearly supported fair and reasonable inferences of the existence of the corporate records and as corporate president, respondent could have produced them. By not offering any evidence as to his inability to comply on June 11th and August 3rd, the respondent did not meet the issues of possession or inability. Consequently, we have prior adjudication of these issues as of June 11th, which were not appealed by respondent but are now attacked by him. The government maintains this prior adjudication is res judicata and the legal or factual basis of our underlying order is not open to reconsideration. Accord, *United States* v. *Secor*, 476 F. 2d 766 (2 Cir. 1973). While *United States* v. *Secor*, supra, sustained a res judicata contention in a similar factual situation to the present case, we are cognizant of our Supreme Court's admonitions in *Maggio* v. *Zeitz*, 333 U.S. 56 (1948) to the effect that a contemnor be permitted to deny his present possession of the corporate books and to give any evidence of present conditions or intervening events which corroborate such a denial. The trial court is obligated to weigh all the evidence before it in determining whether or not there is actually a present ability to comply and whether failure so to do constitutes deliberate defiance. Thus the real problem concerns the evidence admissible in this proceeding.

The fact that the government had carried the burden of proof at the enforcement hearing and the production order had issued establishing prior possession, at a time when continuance thereof is the

reasonable inference coupled with no explanation at the contempt hearing, the contemnor is confronted by a prima facie case. Accordingly, the burden of rebutting the government's evidence is the respondent's and he "must assume an explanatory role or subject himself to reasonable inferences or circumstantial evidence." *Bass* v. *Hutchins*, 417 F. 2d 692, 698 (5 Cir. 1969); *Sheinman* v. *Chalmers*, 33 F. 2d 902 (3 Cir. 1929); *Maggio* v. *Zeitz*, 333 U.S. 56, 75 (1948).

At the hearing the respondent testified the corporate records ordered produced were not presently nor had they been in his control, custody or possession when initially sought by the Internal Revenue Service or when ordered to produce them. When pressed on cross-examination he claimed ignorance as to their whereabouts and on numerous occasions asserted a constitutional claim of privilege to include the Fifth Amendment. Admitting he was the corporate president and its sole capital contributor with 73% of the stock, although not issued, he claims he ceased employment in April 1970, but remained until July 1971 when the corporation allegedly ceased doing business. Reduced to bare bones, respondent's explanation amounts to a denial of possession, custody or control over corporate records and knowledge of their whereabouts since July 1971. He further claims discontinuance of business by the corporation in July 1971 with his succeeding to the business as a sole proprietorship.

The government on the other hand has through the testimony of former employees of the corporation clearly and convincingly established the existence and location of corporate records of the character ordered produced through March 1972; that Harold W. Brobeck was the president and dominant figure in the corporation beyond the alleged time frame it terminated operations; that a corporate Master Charge Account was active and maintained at Western Pennsylvania National Bank at least until April 1972; that no dissolution or wind-up documents were filed with the Commonwealth of Pennsylvania dissolving Beaver Valley Volkswagen, Inc. in accordance with Pennsylvania law; and the current business manager of the alleged corporate successor believes she saw corporate books and records for the year 1971 this year, 1973, [Tr. 127] and that generally these books and records are stored upstairs. [Tr. 127] Furthermore, all witnesses testified they did not remove corporate books and records and to their knowledge corporate records were not removed from the premises.

If we were to merely limit our consideration of respondent's evidence, as urged by the government, to that which does not contradict our production order, we believe his denial of present possession not sufficient to establish his inability to produce the corporate records for the years 1970 and 1971. However, when considering all of the respondent's evidence against that of the government's, his explana-

tion cannot be characterized other than as incredible. Before the Court stands the president of an obvious closed family corporation, which for the year 1970 had grossed receipts of $1,877,891.00 [Government's Exhibit "F"], who was the sole contributor of its capital and principal executive officer claiming in essence he lost control of the corporate records when the corporation allegedly terminated operations and he continued the automobile business as a sole proprietorship. The testimony and evidence is to the contrary making it unreasonable to believe respondent, a person who controlled the business to the extent he did, completely lost control of the corporate records. Therefore the bold denial of past or present possession of the corporate records for the years 1970 and 1971, or knowledge of their whereabouts, we believe, is not sufficient explanation to establish a present inability to produce the corporate records or destroy the evidence and inference of present possession where their existence and prior possession are so clearly indicated. Likewise, respondent's repeated assertions of the Fifth Amendment privilege against self-incrimination cannot be transformed into an adequate or plausible denial of continued possession of the corporate books and records. See *Dittmar* v. *Michelson*, 281 F. 116 (3 Cir. 1922), cert. denied 260 U.S. 738; 8 Wigmore, Evidence (McNaughton rev. 1961) § 2272, at p. 439 footnote. Thus, Mr. Brobeck has failed to purge himself of contempt.

This memorandum shall be deemed to embody findings of fact and conclusions of law required by Rule 52, Federal Rules of Civil Procedure, 28 U.S.C.A.

Dated: October 18, 1973.

/s/ John L. Miller
United States District Judge

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